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Before the
Federal Communications Commission
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

In the Matter of)
)
Thrifty Call, Inc.)
Petition For Declaratory Ruling Concerning) CB/CPD File No. 01-17
BellSouth Telecommunications Inc.)
)
Tariff F.C.C. No. 1)

OPPOSITION

BellSouth Corporation, on behalf of itself and its wholly owned subsidiaries ("BellSouth"), hereby submits the following Opposition to the Application For Review Filed by the Competitive Telecommunications Association/Association of Communications Enterprises Alliance ("Petitioners") of the Wireline Competition Bureau's ("WCB") declaratory ruling, released November 12, 2004, in the above referenced proceeding.¹

I. INTRODUCTION

The declaratory ruling at issue arose from a dispute between Thrifty Call and BellSouth regarding Thrifty Call's reporting of its percent interstate use ("PIU") to BellSouth. Between January 1998 and March 1999, Thrifty Call terminated a negligible amount of traffic on BellSouth's network (less than 500,000 minutes), and its reported PIU was 98 percent interstate. In March 1999, while the intrastate terminating minutes remained relatively constant, the terminating interstate minutes increased dramatically to nearly four million minutes per month.

¹ *In the Matter of Thrifty Call, Inc., Petition for Declaratory Ruling Concerning BellSouth Telecommunications Inc., Tariff F.C.C. No. 1, CCB/CPD File No. 01-17, Declaratory Ruling, DA 04-3576, (rel. Nov. 12, 2004) ("Declaratory Ruling").*

Despite this dramatic change in volume of terminating traffic, Thrifty Call did not revise its 98 percent PIU. The dramatic increase in usage without any revision to the PIU caused BellSouth to examine more closely the nature of the traffic being terminated by Thrifty Call.

Initially, BellSouth requested information to pursue an on-site audit of Thrifty Call to determine the PIU of the traffic being terminated to BellSouth. While on its face Thrifty Call appeared to agree to the audit, it attempted to impose terms and conditions that would have unreasonably delayed BellSouth's ability to verify quickly the accuracy of the PIU in question.

In order to investigate the nature of the traffic, BellSouth initiated test calls over the Thrifty Call network. BellSouth placed 171 intrastate test calls in North Carolina. Thrifty Call did not deliver the CPN for any of the 171 test calls, evidencing an effort to disguise the jurisdictional nature of the traffic. Based on its investigation, on May 10, 2000, BellSouth filed a complaint with the North Carolina Utilities Commission ("NCUC"). Using call detail records obtained from Thrifty Call's own switch recordings, BellSouth demonstrated that the PIUs provided by Thrifty Call resulted in an underreporting of intrastate access minutes terminated to BellSouth, thereby damaging BellSouth through the loss of intrastate access revenues. After a comprehensive hearing, the NCUC agreed with BellSouth and ordered Thrifty Call to pay BellSouth \$1,898,985, representing the amount in intrastate switched access charges Thrifty Call should have paid during the relevant period.

Having lost before the NCUC, Thrifty Call changed venues and sought declaratory relief from the Commission. Thrifty Call wanted the Commission to declare that BellSouth was bound by its interstate tariff in resolving PIU disputes including the audit provisions and a declaration regarding the application of the entry/exit surrogate ("EES") methodology to third party interexchange carriers.

The WCB released its order on November 12, 2004. The WCB found that Thrifty Call had misapplied the EES methodology. The WCB also found that the PIU audit provisions in BellSouth's interstate tariff were permissive and that back-billing of intrastate access charges is governed by BellSouth's state tariffs and is properly addressed by state commissions. In their Application for Review, Petitioners request that the Commission set aside the WCB's declaratory ruling. As discussed below, there is no basis for such an action.

II. DISCUSSION

The core of the Petitioners' argument is that the WCB incorrectly applied the EES methodology because it misinterpreted the applicable tariff provisions from BellSouth's interstate access tariff. To support their claim, the Petitioners point to the definition of "customer" set forth in BellSouth Telecommunications' ("BST") interstate tariff, which identifies a "customer" as an entity that subscribes to services under BST's tariff. The Petitioners also direct the Commission's attention to the EES tariff provision that was in effect during the controversy with Thrifty Call that provided in pertinent part:

interstate usage is to be developed as though every call that enters a customer network at a point within the same state as that in which the called station . . . is situated is an intrastate communication and every call for which the point of entry is in a state other than that where the called station . . . is situated is an interstate communication.

The Petitioners' latch on to the phrase "enters a customer network" that appears in the EES tariff provision, arguing that this definition precludes the WCB's conclusions. For the Petitioners, the word "customer" in the phrase can only lead to a single conclusion—Thrifty Call was the access customer; that no other IXC purchased access services from BellSouth with respect to the calls at issue; and that the only rational interpretation of BellSouth's tariff is that the point of entry for the EES methodology must be the Thrifty Call Network.

There are a number of flaws in the Petitioners' reasoning. In the first instance, Thrifty Call was not the only IXC involved in the calls at issue—a salient fact recognized by the WCB in its order. At the originating end of the call, the call would be handed-off from the LEC serving the calling party to an interexchange carrier. The interexchange carrier would then send the call on to Thrifty Call, which would ultimately deliver the call to the LEC serving the called party. In many instances, BellSouth was not only the LEC that served the called party but also was the LEC that served the calling party. In those instances, Thrifty Call would not have been the only BellSouth access customer for the calls in question, as the Petitioners suggest.

Even if BellSouth were not the LEC on the originating end of the call, the WCB's conclusion regarding the application of EES in the Thrifty Call case was correct. The Petitioners want the Commission to interpret the EES tariff provision as if it were written to describe the point of entry in terms of the customer network. The tariff provision is not so written. The EES methodology prescribed by the Commission, and as reflected in the tariff provision, identified the entry point of a call as the point in which it enters *a customer network*. In the Thrifty Call case, the WCB had to consider that the calls in question transited multiple interexchange carrier networks to determine where the call entered a customer's network. As the WCB correctly concluded, it is irrelevant how the interexchange carriers route the call in applying the EES methodology.² Instead, the relevant factor for applying the EES methodology is whether the call entered an interexchange network, *i.e., a customer network*, in the same state as the called party. It is this construction of the tariff provision, as the WCB concluded, that is consistent with the intent and purpose of the EES methodology.

² *Id.* ¶ 15.

The approach advocated by the Petitioners would turn the EES methodology on its head. It would invite gaming and false allocations of traffic, the very type of results that the Commission sought to avoid when it adopted the EES methodology. Indeed, Thrifty Call argued for an approach similar to that now advocated by the Petitioners. The WCB fully explained that such an approach would lead to the misclassification of intrastate calls as interstate and found that such an "application of the EES methodology is flatly inconsistent with the Commission's purposes in adopting it."³ The Petitioners have advanced no argument that undermines the soundness of the WCB's conclusion.

The Petitioners also seek a reversal of the WCB's determination that an audit was not a necessary prerequisite for adjusting an access customer's PIU or back-billing access charges. Underlying the Petitioners' assertion is an apparent belief that the Commission has preempted state commissions with respect to enforcing intrastate tariffs and that state commissions have no legitimate interest or authority in insuring the accurate billing of intrastate charges. The facts are otherwise. The Commission has never preempted the state commissions' enforcement of an intrastate tariff. Nor has the Commission ever required that a PIU dispute be resolved in accordance with the audit provisions of the interstate tariff. Indeed, Petitioners offer no legal authority for their position.

The fact of the matter is that LECs have multiple remedies with respect to collection of their lawful charges. The audit provision of the interstate tariff is but one way of establishing

³ *Id.* ¶ 16. Indeed, in the *Declaratory Ruling*, the WCB noted that Thrifty Call did not apply a consistent methodology to determine jurisdiction of its calls. Thrifty Call acknowledged that in Georgia, where its switch was located, Thrifty Call used originating and terminating points of the calls to determine jurisdiction, rather than declaring 100 percent of the calls intrastate consistent with its view of the EES methodology.

facts that would support the collection of lawful charges. It is not a collection mechanism, nor does it preclude the use of alternative mechanisms, such as a complaint before a state commission. A LEC is free to pursue such remedies, and if it can meet its evidentiary burden, is entitled to the relief sought.

The Thrifty Call case illustrates why the PIU audit cannot be viewed as an exclusive remedy. Initially, BellSouth sought an audit of the Thrifty Call PIU but Thrifty Call's conduct made clear that a PIU audit was not going to happen in a reasonable amount of time. As a result, BellSouth had to pursue another remedy. The position advocated by Petitioners results in a ludicrous outcome: an access customer can avoid being held to account for misreporting usage simply by contesting an audit. Such an outcome has never been the Commission's policy nor should it become the Commission's policy.

As a last gasp attempt to put some weight on their argument, the Petitioners suggest that, absent federal preemption of the state commissions, there will be double recovery of access charges by the LECs. There is no basis to support this proposition. In these disputes, the issue is the proper jurisdiction of the minutes in question and the application of the appropriate tariff rate. In no instance is the same minute billed both an interstate access charge and an intrastate access charge. If a minute were first billed as an interstate minute and, then, after a finding that the minute is intrastate and should have been billed a full intrastate charge, the customer would be credited with any amount paid under the interstate tariff and would be billed the difference between the intrastate charge and the amount the customer paid (assuming the intrastate charge is higher). The LEC only receives the amount of the access charge from the appropriate tariff. Hence, there is no double recovery.

For the reasons set forth above, the Commission should deny the Petitioners' Application
for Review.

Respectfully submitted,

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Date: December 28, 2004

CERTIFICATE OF SERVICE

I do hereby certify that I have this 28th day of December 2004 served the following parties to this action with a copy of the foregoing **OPPOSITION** by hand delivery and/or by placing a copy of the same in the United States Mail, addressed to the parties listed on the attached service list.

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